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In The

Supreme Court of the United States

October Term, 1991

THOMAS COSTELLO and SUSAN TUCKERMAN COSTELLO,

Petitioners,

vs.

YVONNE B. JANSON, ADMINISTRATRIX ESTATE OF ALMA MONTOUR and PATRICK J. MURPHY, *et ux.*,

Respondents.

On Petition for Writ of Certiorari to the Appeals Court of Massachusetts

BRIEF IN OPPOSITION FOR RESPONDENT YVONNE B. JANSON, ADMINISTRATRIX

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QUESTIONS PRESENTED

1. Whether a person, not a named party or an intervenor in an action, has standing to appeal.

2. Whether a court may convert a motion to dismiss into a motion for summary judgment.

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BRIEF FOR RESPONDENT YVONNE B. JANSON, ADMINISTRATRIX

STATEMENT OF THE CASE

The petition submitted by Thomas Costello and Susan Tuckerman Costello requests a review of a judgment entered by

the Appeals Court of the Commonwealth of Massachusetts, (App. 2a, 1b, 2b, 3b) which affirmed judgments of the Bristol Massachusetts Probate and Family Court, and a judgment of the Supreme Judicial Court of the Commonwealth denying further appellate review (App. 1a).

The lower court action from which the Costellos brought appeals before the Appeals Court of the Commonwealth of Massachusetts is entitled *Yvonne B. Janson, Administratrix of the Estate of Alma Montour v. Patrick J. Murphy and Pamela A. Murphy*, a Petition for Rescission of Deed, Bristol Probate and Family Court No. 89-0019-G1 (App. 19a).

The above action arose from a dispute as to ownership of a one-seventh interest in two adjacent parcels of realty located in Westport, Massachusetts.

The title to the two parcels are derived through the estates of Arthur Montour and his heirs. Yvonne B. Janson, an heir of Arthur Montour, requested that Joseph E. Hanify, Jr., Esquire, research the title to the two parcels. Hanify subsequently retained Preston H. Hood, Jr., Esquire, to complete the research. Hood's research indicated that there were seven shares in the two parcels. One share was held by the estate of Alma Montour, said estate not having been probated.

On July 16, 1986, Hood filed a petition for probate in the estate of Alma Montour with the Briston Probate and Family Court. Yvonne B. Janson was appointed administratrix (App. 6a). On July 7, 1987, Hood filed a petition for sale of real estate for ten thousand dollars ($10,000), said real estate being comprised of the aforementioned one-seventh share in the two parcels of realty. Prior to this date, Patrick J. Murphy, an abuttor to the parcels, had indicated to Hood that he would pay ten thousand dollars ($10,000) for any share that became available for purchase.

No other offers were made to Hood prior to the petition for the license to sell, although the Costellos presently claim an offer of fifteen thousand dollars ($15,000) was made by Susan Tuckerman Costello during that time period. Publication of the citation for the license to sell was made, and on the return date, Thomas Costello appeared at court, attempted to file an appearance for his wife, Susan A. Tuckerman, and indicated to the court that his wife would pay fifteen thousand dollars ($15,000) for the Alma Montour share. The Costellos were not heirs, legatees, or creditors of the estate of Alma Montour, but merely abuttors, as were the Murphys. The court, Harvey J., struck the appearance of Susan A. Tuckerman, as she was not a party in interest in the estate of Alma Montour, but instructed Hood that she be notified to submit a bid or offer on the one-seventh interest. The license to sell issued for fifteen thousand dollars ($15,000) on December 4, 1987.

In accordance with the order of Judge Harvey, bids were received by Hood for the one-seventh share in the estate of Alma Montour. Eventurally the share was sold to Patrick J. Murphy and Pamela A. Murphy for eighteen thousand dollars ($18,000), when a bid of nineteen thousand dollars ($19,000) had been made by Susan Tuckerman Costello, said bid having been mailed to Hood's office while he was on vacation. On his return from vacation the bid was not brought to his attention. Janson conveyed the Montour interest to the Murphys by a deed signed on March 3, 1988. In October 1988, Costello informed Hood that his wife had outbid the Murphys, and therefore, the share in the estate of Alma Montour had not been conveyed to the highest bidder.

On February 24, 1989, Hanify filed a petition for rescission of a deed, Bristol Probate and Family Court No. 89E0019-G1, Janson as petitioner, and the Murphys as respondents (App. 19a). The Costellos have presently claimed that the petition for rescission was filed pursuant to Mass. G.L. Chapter 204, § 24, which allows

interested parties to request the court confirm or ratify acts of an administratrix. The ratification of the conveyance was not the basis for the petition filed by Hanify. Rather, Janson and Hood were admitting to the court that the highest bid had been overlooked, and were requesting rescission, not ratification. The Costellos were not made a party to this petition and were not named in the citation which issued from the court.

As a courtesy to Susan Tuckerman Costello as a prior bidder, and to keep Thomas Costello informed, Hood mailed each of them, individually, a copy of the citation issued in the action. The Costellos claim this mailing constitutes service on them and therefore bestows on them the status of parties.

Although not named parties or intervenors, the Costellos and Sunswick Farm Corporation, their Delaware corporation, on April 10, 1989, filed an appearance, answer, objection and counterclaim in *Janson v. Murphy*. Then the Costellos, on April 13, 1988, filed a third party complaint entitled: Yvonne B. Janson, Administratrix of the Estate of Alma Montour, Petitioner v. Patrick J. Murphy, Pamela A. Murphy, Thomas F. Costello, Susan Tuckerman Costello, Sunswick Farm Corporation, Respondents v. Yvonne B. Janson, Administratrix of the Estate of Maria Courchaine, Yvonne B. Janson, Individually, Preston H. Hood, Jr., Joseph E. Hanify, Jr., Joseph A.P. Montour, Administrator of the Estate of Armand P. Montour and Foster R. Herman, Third Party Defendants. This action was given a docket number of 89E0019-G2 by a probate court clerk. The court refused to issue a citation and no defendants were served, or answered the complaint. The Costellos have claimed that by filing these pleadings, they have become respondents in the petition for rescission of deed. In fact, the Costellos in their notice of appeal used the docket number of *Janson v. Murphy, et al.*, No. 89E0019-G1, but the caption from their third party complaint (App. 33a). It is from the following orders and positions of the court in the petition for

rescission of deed, *Janson v. Murphy, et al.*, No. 89E0019-G1 that the Costellos claimed the right of appeal.

1. On May 26, 1989, the court, La Staiti, J. ordered a hearing on Thomas Costello's status, and as a part of said order took the position that Thomas Costello, Susan Tuckerman Costello, and Sunswick Farm Corporation were not proper parties to the action. Thomas Costello was allowed to participate in this hearing. Thomas Costello and Susan Tuckerman Costello appealed this order.

2. A motion to strike appearance of Thomas Costello was allowed by the court, La Staiti, J., on June 19, 1989. Thomas Costello, as an individual, appealed.

3. On June 15, 1989, a lengthy hearing was held before La Staiti, J. Testimony was presented by the parties and received by the court; Costello was allowed to participate in the hearing and cross-examine. During the hearing it became clear to the court that the petition for rescission of a deed did not state a claim under Massachusetts law. The court indicated that the Murphys should file a motion to dismiss under Massachusetts Rules of Civil Procedures, Rule 12(b), for failure of the complaint to state a claim under which relief can be granted. The Murphys filed such a motion with a brief in which they requested the court to convert the motion to dismiss into a motion for summary judgment. On July 21, 1989, the court, La Staiti, J., treating the motion to dismiss as a motion for summary judgment, granted judgment in favor of the defendants Murphys (App. 4a, 5a). On July 28, 1989, the Costellos as "respondents" filed a notice of appeal (App. 3a).

The issues for determination before the Appeals Court of the Commonwealth of Massachusetts were issues (1) of the Costellos' standing in an action where they were not named parties,

or intervenors, and (2) the treatment of the motion to dismiss as a motion for summary judgment and the subsequent allowance of said motion.

Therefore any other alleged issues raised by the Costellos' petition for a writ are not properly before the Court.

REASONS FOR DENYING THE WRIT

I.

THOMAS J. COSTELLO WAS NOT DENIED AN OPPORTUNITY TO BE HEARD.

Thomas Costello, as an individual, at all times was allowed to participate in hearings before the Bristol Probate and Family Court in the action entitled Yvonne B. Janson, Administratrix v. Patrick J. Murphy and Pamela A. Murphy, No. 89E0019-G1. Costello was allowed to cross-examine witnesses and to present oral arguments. The court allowed this participation although Costello was not a named party or an intervenor. It was subsequent to his appearances before the court that the court ruled that the Costellos had no standing. The argument propounded by Costello that he was denied an opportunity to speak because he was not an attorney is ludicrous. The lower court was more than accommodating to Thomas Costello as a pro se litigant. He was simply not allowed to represent his wife who did not appear in person, or Sunswick Farm Corporation which was not represented by counsel.

II.

THE COSTELLOS HAD NO STANDING TO PROSECUTE AN APPEAL.

It is clear from a reading of the face of the petition for rescission of a deed that the Costellos are not named parties, nor were they named in the citation issued by the court. No amended complaint was filed, nor did the Murphys ever file a third party complaint naming the Costellos as respondents. Massachusetts Rules of Civil Procedures, Rule 24, *Intervention,* provides the proper mechanism by which a person may protect their interest when not a named party. Although the court, La Staiti, J., suggested to Costello that he file a motion to intervene, Costello refrained from doing so. At no time did the Costellos have any interest in the petition for rescission of a deed different in kind from the general public. At all times they were strangers to the action and as such had no legal interest in the claim asserted. *D.J. Doyle v. Darden*, 328 Mass. 288 (1952).

Further, the General Laws of the Commonwealth state that only a person aggrieved by an order or judgment of the Probate Court may appeal to the Appeals Court. Massachusetts General Law, Chapter- 215, Section 9. It is well settled law in the Commonwealth that a person aggrieved is one who has some pecuniary interest, some personal right or some duty to act with respect to the judgement or order of the court. *First Christian Church v. Brownell*, 332 Mass. 143, 147 (1955); *Monroe v. Cooper*, 235 Mass. 33, 34 (1920); *Lawless v. Regan*, 128 Mass. 592, 593 (1880).

In fact, the court in *Lawless* stated that it, ". . . would greatly obstruct and delay the proceedings of the probate court if persons having no legal interest in the result . . . could be permitted to appeal from the decrees of the court." *Id.* at 594.

The Costellos had no interest or legal right different from any other person, and therefore are not persons aggrieved so as to have a right to appeal the orders and judgment of the probate court. *Bolster v. Atorney General*, 306 Mass. 387, 389 (1940).

III.

THE PROBATE COURT WAS CORRECT IN CONVERTING A MOTION TO DISMISS INTO A MOTION FOR SUMMARY JUDGMENT.

A motion to dismiss for failure to state a claim is not waived if not included in an answer, but may be made in any pleading. Massachusetts Rules of Civil Procedure, Rule 12(h)(2).

The filing by the Murphys of a motion to dismiss for failure to state a claim after a hearing before the court was proper. A motion to dismiss shall be treated as a motion for summary judgment if matters outside the pleadings are presented to the court. Massachusetts Rules of Civil Procedure, Rule 12(b). At the June 15, 1989 hearing, lengthy testimony was received by the court. Thomas Costello was present and was permitted to cross-examine and present whatever representations he wished to the court. Having heard matters outside of the pleadings, the court was compelled by Rule 12(b) to treat the motion as a motion for summary judgment.

CONCLUSION

There has been no denial of the Costellos' rights under the United States Constitution, Amendment XIV. The courts at all levels have afforded the Costellos the opportunity to present their claim of ownerhsip of a one-seventh interest in two parcels of property formerly held by the estate of Alma Montour, said interest having been conveyed to the Murphys.

In the most basic terms, the writ should be denied as all appeals pursued by the Costellos are from judgments and orders in an action in which they were not parties, intervenors, interested persons or persons aggrieved, and therefore, lacked standing to bring any appeal.

Respectfully submitted,

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